IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-792

IN THE MATTER OF THE PETITION OF THE GLENVIEW PARK DISTRICT AS OWNER OF ONE EIGHTEEN FOOT GRUMMAN ALUMINUM CANOE,

Petitioner,

vs.

EDYTHE MELHUS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Petitioner, Glenview Park District, respectfully prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on August 25, 1976.

OPINION BELOW

The original opinion of a panel of the Seventh Circuit is reported at 540 F(2d) 1321 and printed as Appendix A hereto at pages 1a-15a.

JURISDICTION

The decision of the Seventh Circuit, by Mister Justices Pell, Tone and Bauer, was entered on August 25, 1976 and rehearing denied on September 16, 1976, and printed as Appendix B hereto at page 16a. This Petition is filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 USC Section 1254(1).

QUESTIONS PRESENTED

1. What is the scope of review of a bench trial in an admiralty case? All Circuits do not agree on this question. The Seventh Circuit held that the scope is no greater than under Federal Civil Procedure Rule 52(a), namely, whether the trial court's finding is "clearly erroneous". The Second and Ninth Circuits are regarded as holding admiralty findings to be freely reviewable.
2. Did this Court's holding in the *Moragne* and *Gaudet* cases, relating to seamen making sea voyages on the dangerous high seas, mandate any duties or apply to pleasure canoe trips on inland rivers, such as the Fox River in Illinois?
3. Did the Seventh Circuit incorrectly conclude that the finding of the trial court that your Petitioner was not negligent, as to the conduct of a pleasure canoe trip, during which the plaintiff's decedent drowned, was clearly erroneous?

STATEMENT OF THE CASE

The Glenview Park District, a municipal corporation, filed its Petition for Limitation and Exoneration, as owner of an 18 foot Grumman canoe weighing less than 20 tons and having a value of less than One Hundred Dollars, in connection with an occurrence on September 30, 1972 when the canoe being operated pursuant to a bare boat charter by George E. Melhus down the Fox River near Sheridan, Illinois capsized and he drowned. The personal representative of the decedent's estate moved to dismiss the petition. The motion to dismiss was taken under advisement pursuant to Rule 13. The personal representative of the decedent also moved for leave to commence and prosecute an action in the state court and to file a claim against the Glenview Park District. The latter motion was granted with a ruling that depositions taken in the state court may be used in the instant federal court. (Rec. 1-17) Thereafter the claimant moved to consolidate with the state court case and to re-activate the proceedings. The claimant filed an answer to the Petition for Limitation and Exoneration praying that the Petition be denied. (Rec. 32)

The complaint for wrongful death was held to trial under the *Moragne* case principles and the court split the issues with trial of liability being first. (Vol. 4, p. 25)

Trial began on April 3, 1975. There was an order excluding witnesses but some of the claimant's witnesses heard testimony in court before they testified. The court found trial counsel for claimant guilty of serious negligence in policing his witnesses but since barring the testimony of

these witnesses would have a drastic effect on the plaintiff's case he was reluctant to do so and denied the motion to bar their testimony. (Vol. 5, p. 5) When the Petitioner rested its case, the Petition for Limitation and Exoneration was denied. Evidence was then heard for the claimant on liability (Rec. 59). At the conclusion of the evidence the court entered findings of fact and conclusions of law in favor of the Glenview Park District and against the claimant. (Rec. 61) Judgment was rendered thereon as per draft order. (Rec. 63) The claimant appealed from the judgment and the Petitioner cross appealed from the Petition.

On September 30, 1972 George Melhus drowned when the canoe he was operating down the Fox River capsized at or near Sheridan, Illinois. The Grumman canoe was owned by the Glenview Park District and furnished for a scheduled canoe trip down the Fox River.

Edythe Melhus testified that she was a resident of the Glenview Park District for seven years. Prior to September of 1972, her children participated in Glenview Park District activities. She received the Park District brochure about twice a year but did not recall seeing the brochure marked Exhibit No. 1. This was the type of brochure she would receive twice yearly. While at the Glenview Administration Building she saw the yellow sheet which advertised the canoe trip. The sheet indicated this was a 15 mile canoe trip to consume approximately 4 hours on the Fox River. There was nothing on the sheet which would lead her to believe that this would be a trip where basic canoe instruction would be given. (pp. 42-45)

To the knowledge of Mrs. Melhus her husband had "been in a canoe several times during his life." She had been in a canoe several times as a youngster. She had never

been on or in the Fox River previously. She had passed the required swimming course to obtain her degree at the University of Illinois. She did not consider herself to be a swimmer. The swimming instruction that Mr. Melhus had as a youngster was not successful because he had asthma. Mrs. Melhus could, "minimally take care of myself in the water." Mr. Melhus' "minimality was even less." (pp. 45-47)

She asked the secretary at the Park District if it would be safe to take youngsters of five and eight years of age on the trip. She was told that it would be perfectly safe because the children would be wearing life jackets. She made no other inquiry as to the availability of other personnel to explain the trip. Her son, Martin, who is eight years old, was a swimmer. Her daughter, Lorna, who was five years old, had not yet started swimming lessons. Mrs. Melhus did not make any inquiry as to whether or not swimming skills would be desirable. She made no inquiry from anyone about the desirability of taking three essentially non-swimmers on the trip. She discussed the trip with her husband. The decision to make the trip was not hers alone. The discussion included the ability or experience of Mr. Melhus in managing a canoe. "—he was able to handle a canoe, he didn't think it was a very complex task." (pp. 47-51)

She saw the river at the launching site. It looked calm. The river gave her no concern for her safety or she would not have gotten into the boat. She saw nothing unusual about the river. Jeff assisted them in carrying the canoe to the river's edge. Nothing was said by her as to whether or not she or her husband could manage this canoe. They were "—responsible people and we would not have signed

up for a trip that we thought we couldn't handle." The river was no different than it was expected to be when the trip was discussed in its planning stage. She felt free to cancel the trip if she was concerned about the condition of the river. They had no discussion about getting a more experienced canoeist ir their canoe. There was no discussion about putting a stronger swimmer in the canoe in lieu of one of the adults. There was no attempt made to split up the Melhus family and put them in different canoes. If she felt this was a desirable condition, she would have spoken up. (pp. 51-55)

Two children's life jackets were distributed and they asked for two more. They were given a white plastic covered life jacket and a red or orange capote over the neck type life jacket. Mr. Melhus put on an orange type jacket and Mrs. Melhus wore the white jacket. Mrs. Melhus thought her husband's jacket was too small. Mr. Melhus said he checked with Guy and was told the jacket was just fine. At that time she saw only four jackets that were available for them. After her husband drowned, her son, Martin, told her there were other available jackets right within their boat. She did not see her husband look for other life jackets because there were none in their view. Mrs. Melhus sat in the bow of the canoe. The two children were in the center and her husband was in the stern. Her husband expressed no difficulty in managing the canoe when they were first launched. There was no request by them for further instructions in managing the canoe. They were told that this was a family trip and not a trip for canoe instruction. They determined that the water was calm and they could manage the boat. She does not remember which position they held in this line of canoes. (pp. 59-66)

They got into the water (launched the canoe) at approximately 11 or 11:30. They were on the water about 35 to 45 minutes before the accident. Her husband's watch stopped at 12:04. During this time she does not recall any difficulty in the management of the canoe. There was no need to ask for any assistance from anyone. The water appeared to be moving smoothly. During the first 30 or 35 minutes there was nothing unusual about the speed of the water or rate of current. During that period of time there was nothing that would indicate that the trip was anything other than what they had expected. Just prior to the accident, they saw a boat in rapid water. They observed them get out of the water and back into line. She told her husband that their boat was being pulled to the rapid water. He said to stop paddling. He told Martin to stop paddling and that he would try to turn the boat away from the rapid water. George was sitting in back of her so she did not see what method he was using in an attempt to turn the boat. They came upon a branch jutting out into the water. She did not reach for the branch. The boat went under the branch. She then saw a large stump jutting out of the water and the boat ran into the stump. She was thrown from the canoe. She clung to the heavy stump of a tree. (pp. 66-69)

REASONS FOR GRANTING CERTIORARI

I.

THE DECISION OF THE SEVENTH CIRCUIT AS TO SCOPE OF REVIEW IN ADMIRALTY IS IN CONFLICT WITH THAT OF OTHER CIRCUITS.

The conflict in Circuits, as to the scope of review in admiralty, was recognized by the Seventh Circuit in the instant opinion (page 4):

> "Melhus cites *Barbarino* v. *Stanhope S.S. Co.*, 151 F.2d 533, 555 (2d Cir. 1945), and *Pacific Tow Boat Co.* v. *States Marine Corp.*, 276 F.2d 745, 752 (9th Cir. 1960), to support her position that the determination of negligence, insofar as it requires the testing of particular facts against a fixed standard of conduct, is a jural act involving a question of law and is freely reviewable by this court.
>
> Whatever may be the view of other courts of appeals, it appears that this court has already adopted a position regarding reviewability of a finding or conclusion of negligence. *In re Rapp's Petition*, 255 F.2d 628, 632 (7th Cir. 1958), ruled that this court has no greater scope of review in admiralty cases than under Rule 52(a) of the Federal Rules of Civil Procedure. In *Commercial Transport Corp.* v. *Martin Oil Service, Inc.*, 374 F.2d 813, 817 (7th Cir. 1967), after observing that the trial court had found both Commercial and Martin at fault, this court stated that "(i)n reviewing the findings of the admiralty court, the 'clearly erroneous' rule governs." See also *Schwerman Trucking Co.* v. *Gartland Steamship Co.*, 496 F.2d 466 (7th Cir. 1974).
>
> We hold that review of a trial court's finding of non-negligence in an admiralty proceeding is governed by

> the clearly erroneous rule specified in Fed.R.Civ.P. 52(a). We consider the present case to be governed by *McAllister* v. *United States*, 348 U.S. 19, 20 (1954), which permits an appellate tribunal in an admiralty case to set aside the judgment below only when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

II.

THE LAW PROTECTING SEAMEN WHO SIGN ON FOR VOYAGES ON OCEAN VESSELS TRAVELING DANGEROUS HIGH SEAS HAS A VERY STRAINED APPLICATION TO PLEASURE CANOE TRIPS ON INLAND RIVERS, AS THE SEVENTH CIRCUIT COURT'S OPINION DEMONSTRATES.

In stating the law applicable to the facts of this case, the Seventh Circuit Court noted that this Court's decision in *Moragne* v. *States Marine Lines*, 398 U.S. 375 (1970) created a uniform federal cause of action for maritime death. The reviewing Court then proceeded with its rationale as follows (page 5):

> "Subsequently, in *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 577 (1974), the Supreme Court observed that its *Moragne* decision was designed to extend to the dependents of maritime wrongful-death victims admiralty's "special solicitude for the welfare of those men who under(take) to venture upon hazardous and unpredictable sea voyages." Similarly, the *Gaudet* opinion suggested that the shape of the new maritime wrongful-death remedy be guided by the principle of maritime law that "certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules . . ." *Id.* at 583.

Nonetheless, there is nothing in *Gaudet's* reference to the special solicitude extended to the dependents of maritime wrongful-death victims which qualifies in any way the necessary foundation of establishing actionable negligence, the basic ingredients of which are (a) negligence and (b) proximate causation, it being only necessary with regard to the second ingredient that the negligence have been a proximate cause. See 57 Am.Jur.2d Negligence § 129, at 480 (1971).

In the present case, the district court concluded that Glenview was not guilty of a breach of any duty or guilty of any negligence possessing causal significance. We recognize that there is evidence to support this finding, but we are left with the definite and firm conviction that a mistake has been made. We are persuaded that the policies underlying *Moragne* and *Gaudet* require us to accept Melhus's contention that the trial court erred in concluding that there was no Glenview negligence which was a proximate cause of the death by drowning of George E. Melhus."

It is submitted that the special solicitude for the welfare of those men who undertake to venture upon hazardous and unpredictable sea voyages, can have no relevance to or context for a pleasure canoe trip on the Fox River. The inland river is not as hazardous and unpredictable as the sea.

A seaman signs on a voyage under articles he cannot terminate, but as Mrs. Melhus testified, they felt free to cancel the trip if they were concerned about the condition of the river. It seems difficult to seriously suggest that the law relating to men making sea voyages, as in the *Gaudet* case, was ever consciously intended by this court to apply to pleasure canoe trips on inland rivers.

It is submitted that the law of the "high seas" can have, at best, only a very strained application to canoes on inland rivers. The ancient law of admiralty is so archaic that it did not obtain a remedy for wrongful death until 1970, with the *Moragne* decision. A strained application of the law of the "high seas" for ocean going vessels to canoe trips on inland rivers does nothing to enhance the status of the law of admiralty.

It is submitted that judged in the light of modern day concepts the district judge was correct, and his finding should be affirmed. Only by donning irrelevant and archaic spectacles, which produces a highly strained application, does the Seventh Circuit conclude that the District Judge's finding was clearly erroneous, assuming that that is a correct criterion for the scope of review in admiralty.

It is respectfully submitted that, apart from the injustice of reversing the trial court, there is here involved not only an important aspect of admiralty law, which is increasingly recurring in the federal courts but also the scope of review in such cases.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 75-1494, 75-1495

IN THE MATTER OF THE PETITION OF THE GLENVIEW PARK DISTRICT AS OWNER OF ONE EIGHTEEN FOOT GRUMMAN ALUMINUM CANOE,

Petitioner-Appellee, Cross-Appellant,

v.

EDYTHE MELHUS,

Claimant-Appellant, Cross-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 C 786
FRANK J. McGARR, *Judge.*

ARGUED FEBRUARY 24, 1976 — DECIDED AUGUST 25, 1976

Before PELL, TONE, and BAUER, *Circuit Judges.*

PELL, *Circuit Judge.* This admirality litigation was initiated by the Glenview Park District (Glenview) filing a petition in the district court seeking exoneration from or limitation of liability in connection with the drowning of Dr. George E. Melhus on September 30, 1972. The widow, as personal representative of the decedent's estate, filed in the action a claim against Glenview for wrongful death damages. Following a six-day bench trial, the

district court denied Glenview's petition but on the merits entered judgment in Glenview's favor on the wrongful death claim. Both parties have appealed.

While there are some contradictions in the testamentary versions of the happenings leading to the death, and while we will advert in greater detail to certain specifics of the evidence which we deem dispositive of the legal issues raised, the following is the general factual background of this litigation as to which there appears to be no dispute.

In the fall of 1972 Glenview advertised a 4 hour, 15 mile canoe trip down the Fox River. In choosing a river to canoe Glenview checked an Illinois Department of Conservation booklet and narrowed the choice to two. The Kishwaukee was rejected in favor of the Fox, which was found to be a calm, slow moving river with very few obstructions as well as being wide. Under ordinary conditions the Fox River was shallow enough for wading. The Glenview supervisors had taken a reconnaissance run and two weeks before September 30 had taken a group trip through. They assumed that conditions would be the same as on the previous trips. They did not check with the Dayton Gauging Station or other sources for river conditions. The Fox on September 30 was at flood stage and at places had risen over its banks with the result that trees on the banks were in the water as well as the water being closer to overhanging branches.

The trip which the Melhus family took was advertised by Glenview as follows:

> FEE: The fee will be $8.00 per person and will include: Transportation by bus to Sheridan, pick-up at Wedron and transportation back to Roos, use of canoe, paddles and life preservers, and supervision down the river.

Mrs. Melhus went to the Glenview office on September 16 and asked the secretary what canoeing skill was needed to participate in the trip. She was told that it was minimal and would be perfectly safe for her five and eight year old children. Children under 16 were not allowed on the trip unless accompanied by an adult. She paid the fees and was registered for the trip. Her husband was a non-

swimmer, had been in a canoe several times as a youngster and had told his wife that he did not think canoeing was a very complex task.

On the day of the trip, the Glenview supervisors laid out eight canoes on the river bank and distributed various life jackets and ski-belts. Children were required to wear life preservers, but it was optional with adults. Dr. Melhus put on some sort of flotation equipment before embarking, but the evidence is not clear as to what his status was in this regard at the time of the fatal occurrence. Guy Bacci, one of the Glenview supervisors, told the group that his brother would be in the lead canoe, that he would be in the last canoe, and that he would like everyone to stay relatively in the center of the river. No basic canoeing instructions were given, nor was there inquiry as to swimming ability or canoeing expertise of the voyagers.

During the early part of the trip the Melhus canoe was noticed as zigzagging considerably. After some 45 minutes on the water, the group approached an island. The Melhus canoe was in the center of the river, and as the family approached the island they saw trees in the water about 50 feet ahead of them. Dr. Melhus took over the sole paddling and attempted to steer the canoe to the left to avoid the trees. While still off the bank of the island, the canoe struck a low hanging limb which raised the canoe and spilled the family into the river. Dr. Melhus drowned in 8 to 10 feet of water.

Formal findings of fact and conclusions of law were not entered, but the final judgment order referred to the findings of fact and conclusions of law announced in open court. The judgment order recited that the canoe in question was not being operated under a bareboat charter, that the loss was not occasioned without the privity and knowledge of the Glenview Park District, and that Glenview, its agents and employees, were not guilty of a breach of any duty or guilty of any negligence which did or could have caused or contributed to the death of George Melhus.

The action of the district court is claimed to raise a number of issues for this court's consideration. We are satisfied, however, that the principal issue in these cross

appeals is whether or not Glenview was guilty of actionable negligence. Before turning to that pivotal issue, we consider the threshhold question of the scope of our review.

I. Scope of Review

Melhus cites *Barbarino* v. *Stanhope S.S. Co.*, 151 F.2d 553, 555 (2d Cir. 1945), and *Pacific Tow Boat Co.* v. *States Marine Corp.*, 276 F.2d 745, 752 (9th Cir. 1960), to support her position that the determination of negligence, insofar as it requires the testing of particular facts against a fixed standard of conduct, is a jural act involving a question of law and is freely reviewable by this court.

Whatever may be the views of other courts of appeals, it appears that this court has already adopted a position regarding reviewability of a finding or conclusion of negligence. *In re Rapp's Petition*, 255 F.2d 628, 632 (7th Cir. 1958), ruled that this court has no greater scope of review in admiralty cases than under Rule 52(a) of the Federal Rules of Civil Procedure. In *Commercial Transport Corp.* v. *Martin Oil Service, Inc.*, 374 F.2d 813, 817 (7th Cir. 1967), after observing that the trial court had *found* both Commercial and Martin at fault, this court stated that "[i]n reviewing the findings of the admiralty court, the 'clearly erroneous' rule governs." See also *Schwerman Trucking Co.* v. *Gartland Steamship Co.*, 496 F.2d 466 (7th Cir. 1974).

We hold that review of a trial court's finding of non-negligence in an admiralty proceeding is governed by the clearly erroneous rule specified in Fed.R.Civ.P. 52(a). We consider the present case to be governed by *McAllister* v. *United States*, 348 U.S. 19, 20 (1954), which permits an appellate tribunal in an admiralty case to set aside the judgment below only when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

II. The Negligence Issue

This court has had little opportunity to review admiralty cases involving claims of negligent conduct resulting

in death by drowning.* When one such case was presented in *Rundell* v. *La Campagnie Generale Transatlantique*, 100 F. 655 (7th Cir. 1900), this court found it unnecessary to examine in depth the concepts of proximate cause or duty in relation to a martime tort cause of action. Relying on the analysis set forth in *The Harrisburg*, 119 U.S. 199 (1886), this court ruled that general maritime law allowed of no recovery in an action of tort for the death of a deceased occurring upon the high seas by reason of the negligence of the defendant. 100 F. at 659. Our *Rundell* decision cannot stand in light of *Moragne* v. *States Marine Lines*, 398 U.S. 375 (1970), in which the Supreme Court overruled *The Harrisburg*, *supra*, and created a uniform federal cause of action for maritime death.

Subsequently, in *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 577 (1974), the Supreme Court observed that its *Moragne* decision was designed to extend to the dependents of maritime wrongful-death victims admiralty's "special solicitude for the welfare of those men who under[take] to venture upon hazardous and unpredictable sea voyages." Similarly, the *Gaudet* opinion suggested that the shape of the new maritime wrongful-death remedy be guided by the principle of maritime law that "certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules . . . ." *Id.* at 583.

Nonetheless, there is nothing in *Gaudet's* reference to the special solicitude extended to the dependents of maritime wrongful-death victims which qualifies in any way the necessary foundation of establishing actionable negligence, the basic ingredients of which are (a) negligence and (b) proximate causation, it being only necessary with regard to the second ingredient that the negligence have been *a* proximate cause. See 57 Am.Jur.2d *Negligence* § 129, at 480 (1971).

In the present case, the district court concluded that Glenview was not guilty of a breach of any duty or guilty of any negligence possessing causal significance. We recognize that there is evidence to support this finding, but we are left with the definite and firm conviction that a mistake

* See footnote 7 *infra* at 15.

has been made. We are persuaded that the policies underlying *Moragne* and *Gaudet* require us to accept Melhus's contention that the trial court erred in concluding that there was no Glenview negligence which was a proximate cause of the death by drowning of George E. Melhus.

A. Proximate Cause

The testimony at trial established that George Melhus was an inexperienced canoer and a non-swimmer. He died because he was unable to control the canoe in relatively calm current,[1] was washed into an overhanging limb, and as a non-swimmer drowned in the increased depth of the Fox River, which was at flood stage on the day when Glenview conducted the supervised family canoe outing. Even if the trial court correctly found that the presence of the Melhus canoe along the bank and among the overhanging foliage or branches was a proximate cause of its overturn, its finding or conclusion that the canoe's presence there was not the consequence of any negligent conduct of Park District officials rested upon an erroneously restrictive application of the basic tort concepts of proximate cause and duty.[2]

Although the record establishes that the inability of Melhus to handle the canoe had a direct bearing on its presence among the overhanging branches at the edge of the Fox River, there is no basis for concluding that his canoeing incompetence, whatever its degree or extent, represented the sole and exclusive cause of the drowning

[1] There was a dispute in the testimony as to the extent to which the flood condition of the Fox and a claimed narrowing of the river bed at the point of the casualty increased the rapidity of the water flow. While the river at no point apparently could have been characterized as white water, because of the conflict we are assuming for the purposes of this appeal, but not in any sense as law of the case, that the current was relatively calm.

[2] The district court's oral findings included the following observations regarding proximate causation and causal negligence:

> [A]nd . . . the participants knew during the trip that the center of the channel was the place to be; and I find that the leader of the expedition and most of the other canoes were there; the presence of the Melhus canoe along the bank and among the foliage or branches, which was *the proximate cause* of its encounter with the branch and its overturn, was not the consequence of any negligent conduct of Park District officials. (Emphasis supplied).

The court's quite distinct findings regarding the scope of Glenview's duty for the safety of canoeist Melhus are partially reproduced in the text *infra*.

death. Another salient factor was the depth of the river on the day in question. The district court judge expressed the view that, under most conditions, depth of the water is not a controlling factor in boating safety.[3] He thought that the depth of the Fox River on the date of the tragedy was crucial only if it "result[ed] in a marked increase in the swiftness of current." Accordingly, he concluded that the depth of the river had "no clear causative effect resulting in a canoe being along the island bank and involved with the overhanging branches." Recognizing that it was obvious that the added depth of the waters brought the branches closer to the water level at river's edge, the district court judge still could "see no negligence of Park District officials, which was the causative factor resulting in Dr. Melhus's canoe being among these branches."

The only fair reading of the district court's summation of the case is that it though the tragedy was caused by the inability of Dr. Melhus to handle the canoe and to keep it in the center of the river channel. Assuming arguendo that the evidence warrants such a conclusion, this court is unable to agree with the district court's proximate causation analysis. Generally speaking, an inquiry into proximate causation presupposes an affirmative finding of negligence. 65 C.J.S. *Negligence* § 103, at 1134 (1966).

Unfortunately, particularly for juries, some fuzziness has always been associated with the definitions and tests of proximate causation. Because the content of the concept of proximate cause must be determined by the peculiar facts and circumstances of the particular case, see 65 C.J.S., *supra* at § 103, none of the many various definitions of the concept can "afford a definite and invariable rule whereby a line can be drawn between those causes

[3] The court's observation would appear to be eminently correct as long as an occupant is able to remain within the craft. It would appear obvious, however, that once a non-swimmer is dislodged from a canoe the difference between the depth of 2 to 3 feet and 8 to 10 feet would have crucial significance on his safety. Whether agreed to or not by canoeing experts, it would appear that a canoe has a greater potential for tipping-over than a flat bottomed scow. While this might not reflect upon the immediate cause of the presently involved spilling, it would appear to be germane to the matter of inquiry as to swimming ability and canoeing expertise where it was known or should have reasonably been known upon inquiry that the depth of water had changed from a wading level to one not so.

which the law regards as sufficiently proximate and those which are too remote to be the foundation of an action . . . ." *Id.*

Here, Dr. Melhus's assumption that he could handle a canoe adequately proved to be unfounded. Eschewing any purpose of relying on notions of contributory negligence or assumption of risk, which it duly recognized as not defeating recovery in admiralty, the district court nonetheless defeated recovery on the basis of proximate cause analysis. We find it unnecessary to chart the precise fashion in which the substantive notions underlying the tort concept of proximate cause flow into or eddy out from the related notions underlying the tort concept of duty of care. We agree with appellant Melhus that the applicable law of legal causation is much broader than the last act of an imperiled claimant and that, by ignoring the prior omissions of Glenview which contributed to the catastrophe, the district court applied an erroneously narrow concept of proximate cause. See also *Petition of Kinsman Transit Company*, 338 F.2d 708 (2d Cir. 1964), *cert. denied*, 380 U.S. 944 (1965).

B. Duty of Care

It is well established that the existence of a duty to use due care is not destroyed by a corresponding duty on the part of another. See 65 C.J.S., *supra* at § 4(3), at 490. Inquiry as to the nature and extent of competing duties lies at the heart of any negligence case.

Here, the district court judge thought that his task was to "balanc[e] the obligations of the individuals for their own safety, as against the obligations of the Park District to provide for their own safety."[4] In his effort to carry out the defined task, the district court viewed the dispositive issue as being what Glenview "knew or should have known concerning the dangerous conditions

[4] As a background comment setting the stage for the balancing of obligations, the district court judge "assume[d] that Dr. Melhus and his family had concluded that their level of swimming and canoeing ability were consistent with their own safety before they decided on the trip." We need not determine whether or not this comment properly states the presumption that the person injured was at the time of his injury exercising due care for his own safety. See 57 Am.Jur.2d, *supra* at § 301.

of the river at the time of embarkation; and whether under those circumstances they should have either cancelled the trip or warned the individuals involved that the trip was not as advertised or had some unusual circumstance which would cause them to reconsider their desire to participate."

Mrs. Melhus on appeal contends that her claim of actionable negligence should not be limited to the pre-embarkation period, arguing, *inter alia*, both on a negligence and a breach of warranty basis that Glenview undertook the duty of supervision but failed to do so in a manner resulting in the casualty. We have difficulty in saying that this claim is meritless;[5] however, we think it sufficient for the disposition of this case to look at the situation as it was viewed by the district court.

It appears clear to us that Glenview, having undertaken this program for the public and having made preliminary investigation presumably in the interest of the safety of that public, could not just blandly assume that conditions along the river would remain immutable.

[5] While a Louisiana Court of Appeals found the word "supervision" sufficiently ambiguous as to permit parol evidence, *Lou-Con, Inc.* v. *Gulf Building Services, Inc.*, 287 So.2d 192, 200 (La.Ct.App. 1974), *aff'd*, 290 So.2d 899, courts appear ordinarily to rely upon the Websterian definitions of overseeing with direction, superintending, or inspecting with authority. For example, *Lowe* v. *Chicago Lumber Co. of Omaha*, 283 N.W. 841, 844 (Neb. 1939); *Schabbing* v. *Seabaugh*, 395 S.W.2d 256, 259 (Mo.App. 1965); *Saxton* v. *St. Louis Stair Company*, 410 S.W.2d 369, 377 (Mo.App. 1966). In *Schabbing*, the court found that even if the farmer-employer had exercised supervision over an inexperienced tractor driver, there would have been no discovery of the concealed hole which caused the driver to be bounced off the tractor. There, of course, was no proximate causation. In the case before us, Glenview apparently was satisfied that it discharged its duty of supervision by having the lead and the final canoe of the flotilla manned by its staff members. It is not clear to us why supervision should not have included splitting the family with competent canoers, overseeing that proper life preservers were worn at least by non-swimmers, exercising special precaution by the supervisors in areas where trees were in the water, and giving some instructional help to a canoer who had been zigzagging. Ultimately, much of the supervision that reasonable persons might have found appropriate would have been determined by inquiries as to water conditions, swimming ability, and canoeing expertise. Since these were inquiries which would have been made at the pre-embarkation period, we will confine ourselves to that time period. We find it unnecessary to rule that the failure to supervise was an additional element of negligence, but we do not find that it was not.

Had Dr. Melhus been properly and sufficiently warned of the dangers of overhanging branches near the edge of the river's bank, Glenview would be in a better position to argue that it had fulfilled its duty of due care. The record establishes no such warning, primarily because the co-supervisors of the trip were unaware that the Fox River was at flood stage on the day of the mishap. If Melhus's assumption that he could handle a canoe adequately ultimately proved to be unfounded, the same observation applies *a fortiori* to the assumption of Geoffrey Bacci, a co-supervisor, that the river conditions for that portion of the river the flotilla would traverse would be the same as they had been two weeks earlier.

The record contains the following colloquy:

> Q . . .
> Sir, did you assume that the river conditions for that portion of that river that you were to traverse would be the same that they had been when you were on the river two weeks before hand?
> A Yes.
> Q Sir, did you receive any orders or instructions from [higher Park District recreation officials] to personally call the Dayton Gauging Station or other weather bureau people for river condition information prior to the trip?
> A No.
> Q And did you personally make such a call?
> A No.
> Q Do you know if any other Park District employee did?
> A I don't know.

The volume of water measured at the Dayton Gauging Station for the canoe trip which Bacci had taken two weeks earlier was about two and a half times less than that measured for September 30, 1972. No Glenview agent inquired as to depth or volume calculations, yet the record indisputably establishes that the Fox River was at flood stage on the day of the mishap.

The duty on which actionable negligence is based can never be limitless; instead, duty is dictated and measured by the exigencies of the occasion or situation as they are,

or should be, known to the actor, and it varies in each case as the facts and circumstances vary. 65 C.J.S., *supra* at § 4(2), at 486. Retrospective hindsight is an improper basis for ascertaining the scope of legal duties. Nonetheless, we are not persuaded that the present case really implicates that simple principle.

In many respects, the present case presents a question of nonfeasance rather than misfeasance. The Park District personnel appear to have assumed that the Illinois Department of Conservation's designation of novice canoe trails was sufficiently reliable as to warrant reliance thereon. Certainly, we cannot fault the Bacci brothers for conducting a reconnaissance run of the Fox River more than a month before the first of the two canoe outings. Nor can this court question the subsidiary fact that the Bacci brothers had found the Fox to be a calm, slow moving river. As the persons most intimately connected with the actual task of leading the canoe flotilla, the Bacci brothers' preparatory work was well beyond the threshhold of ordinary care. The record does not establish any basis for inferring that these two recreation specialists were even aware that the Park District's secretary had given an oral assurance that the trip would be perfectly safe for little children.

Nonetheless, the final preparations on the day of the family outing were not so complete. Assuming arguendo that Glenview's personnel could rely completely upon the trustworthiness of the Department of Conservation's designation of the lower Fox River as a novice canoe trail, those same personnel could not ignore the brochure's warning that "[s]treams change from year to year, season to season or even day to day; and information true today may not be true tomorrow." The heavy rains in the weeks preceding the late September canoe outing had, in fact, greatly increased the water depth. Outhanging branches jutting over the surface of the water necessarily became potentially dangerous obstructions to the success of a beginners' canoe trip. By ignoring the possibility that the increased depth might place dangerous jutting branches in the path of inexperienced canoeists, the Park District personnel created one link in the "chain of avoidable circumstances leading to the accident." See S.Rep. No.

92-248, 92nd Cong., 1st Sess. (1971), 2 U.S. Code Cong. & Admin. News 1333, 1334 (1971).[6]

At the trial, Glenview's own expert witness opined that the only specific hazard on the section of the river between Sheridan and Wedron was the possibility of being washed into overhanging branches. This hazard is not generally considered a hazard of low water, especially on the Fox River, because usually the river "is shallow enough." In response to a question whether the existence of flood level condition made the use of the river by canoeists any more dangerous, Glenview's witness explained that his answer for a river like the Fox was negative. However, he thereupon qualified his flat negative by observing that:

> The only—if you could call it a danger, would be being washed into an overhanging branch, which is normal even on low-water streams, as well.

The expert witness further testified that at any time where there was any moving water and a slow current, like the conditions of the Fox, "you can be washed into an overhanging branch, which does not move, and the current will tend to take the canoe out from under you."

[6] Congress has not explicitly spelled out the duties placed upon those who sponsor or conduct canoe trips. However, the Senate Report accompanying its version of the bill enacted as the Boat Safety Act of 1971, P.L. 92-75, 46 U.S.C. § 1451 et seq., does provide some helpful guidelines. The Senate Report spelled out some very distinct reasons why the legislation was needed:

> Over 40 million Americans engage in recreational boating each year in approximately 9,000,000 boats. Further, boating activity is increasing rapidly. It has been estimated that the number of recreational boats in the United States is increasing at the rate of about 4,000 per week and that by 1975 over 50 million persons will be engaged in the activity.
>
> • • •
>
> The causes of accidents are diverse. In many instances, they involve multiple factors. However . . . [promulgated] standards . . . could substantially reduce the level of fatalities now resulting from boating mishaps.
>
> For example, most fatalities are the result of boat capsizings or persons falling overboard. While statistics can be . . . kept in such a way as to indicate that these result from human error by the operator (e.g., overloading, personal movement in the boat, standing, violent maneuver), it seems clear that many tragedies might be prevented . . . .

S.Rep. No. 92-248, 92nd Cong., 1st Sess. (1971), 2 U.S. Code Cong. & Admin. News 1333, at 1333-34 (1971).

We agree with the district court that it is obvious that the added depth brings the branches closer to the water level at the river's edge. Although it is impossible to quantify the increased magnitude of the danger to canoeists engendered by flood level, that particular condition of the river does, at the very minimum, create more dangerous conditions. Where the leaders of a supervised canoe trip have a quick and inexpensive way to ascertain water levels by making a telephone call to a water gauging station and where representatives of the trip sponsor have orally assured potential participants that the trip is perfectly safe, admiralty law must recognize a duty of inquiry. We need not go so far as to characterize this routine canoe trip as a venture upon a hazardous and unpredictable sea voyage, see *Gaudet, supra* at 577, in order to locate the duty of inquiry. Based upon the testimony of Glenview's expert canoeist, the possibility of a canoe being washed into overhanging branches was eminently predictable.

Our holding regarding the matter of Glenview's duties and its breach thereof must be read within the framework of the particular facts presented in the case at bar. We need not reach questions relating to the general duties which the planners and leaders of canoe outings must invariably fulfill in order to preclude the possibility of being held liable for any loss or damage that may ensue. Our recognition that duty is dictated and measured by the occasion or situation and varies in each case with the facts and circumstances compels the conclusion that under some circumstances the sponsors of a canoe outing may legitimately bypass a technical inquiry regarding the water level of a designated canoe trail. Some of these trails may be so situated as to make the hazard of obstructing tree branches a virtual impossibility.

In our holding on the particular facts of this case we also are not intending to suggest any underlying Big Brother rationale to the effect that a governmental unit has because of its status a special duty of safeguarding its citizens against their own carelessness or follies. Glenview should have no greater duty of care in situations such as the present one than a private entrepreneur would have had; but it should be subject to no lesser standard.

The district court's finding that Glenview, its agents and employees, were not guilty of any breach of duty violates the underlying policies of *Moragne* and *Gaudet*. It was clearly erroneous to rule that the omissions of Glenview did not proximately cause the death of George Melhus. We are persuaded that the failure to check water conditions and to warn the participants about overhanging branches were negligent omissions which acted as proximately causative factors resulting in the Melhus canoe being among the branches. The district court should have found against Glenview on the actionable negligence question.

On remand, the district court should determine whether there was any contributory negligence on the part of Melhus which reduces recovery under the established admiralty principle that a plaintiff's negligence does not totally defeat recovery but may reduce on a proportional basis its amount.

Inasmuch as the district court did not reach or make any findings on the matter of contributory negligence, we will not attempt any analysis of that issue which will be, of necessity, dependent as a threshhold matter upon the determination of the facts which under well established tort principles will reflect upon the negligence, if any, of Dr. Melhus which proximately contributed to his death.

III. Denial of Exoneration and/or Limitation of Liability

As indicated herein before, this litigation was instituted by Glenview's petition for exoneration from or limitation of liability under 46 U.S.C. §§ 181 et seq. The petition was denied by the district court, and Glenview conditionally cross appealed. We find no merit in the cross appeal.

Inasmuch as we have held that Glenview was guilty of actionable negligence, its liability for damages after the determination of the extent, if any, to which that liability might be reduced by contributory negligence could not perforce have arisen without its privity or knowledge.

Glenview briefly urges here its district court argument that Dr. and Mrs. Melhus were bareboat charterers, that they navigated the canoe and that it was their negligence which caused the occurrence. As we have already indicated, the negligence of Dr. Melhus, if there was such negligence proximately contributing to the accident, was not the sole proximate cause of the occurrence. Also it appears to us that in this canoeing trip there was about as much relationship to a maritime bareboat charter as there would be in the purchase of a ticket and participating in a ride in a boat of an amusement park Tunnel of Love.

In accordance with the above opinion, the judgment in favor of Glenview on the wrongful death claim is reversed and remanded for further proceedings in accordance with this opinion. The judgment denying the exoneration and limitation petition of Glenview is affirmed.[1]

AFFIRMED IN PART; REVERSED IN PART

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

[1] The opinion in this case was prepared and approved prior to the decision of *Chapman* v. *United States*, ... F.2d .... Nos. 75-2162 and 75-2163 (7th Cir. August 20, 1976), which was an admiralty case involving a claim of negligent conduct resulting in death by drowning. This court rejected the contention of the United States that it owed no duty, maritime or terrene, to mark with a buoy or other type of marking a submerged dam in the Kankakee River, over which the United States had claimed a continuing right of supervision for a century.

APPENDIX B

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 16, 19 76

Before

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. PHILIP W. TONE, Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

IN THE MATTER OF THE PETITION OF THE GLENVIEW PARK DISTRICT AS OWNER OF ONE EIGHTEEN FOOT GRUMMAN ALUMINUM CANOE, Petitioner-Appellee, Cross-Appellant, vs. EDYTHE MELHUS, Claimant-Appellant, Cross-Appellee.	Appeal from the United States District Court for the Northern District of Illinois Eastern Division 73 C 786 Frank J. McGarr, Judge

Nos. 75-1494 & 75-1495

On consideration of the petition of the appellee, Glenview Park District, for a rehearing by the court in the above-entitled appeal, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the appellant for a rehearing in the above-entitled appeal be, and the same is hereby denied.

76-792

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1976

IN THE MATTER OF THE PETITION OF THE GLENVIEW PARK DISTRICT AS OWNER OF ONE EIGHTEEN FOOT GRUMMAN ALUMINUM CANOE,

Petitioner,

vs.

EDYTHE MELHUS,

Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent prays that a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on August 25, 1976 shall not issue.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I.

THERE IS NO CONFLICT BETWEEN CIRCUITS AS TO SCOPE OF REVIEW IN ADMIRALTY.

This Court made it clear in *McAllister* v. *United States*, 348 U.S. 19, 20 (1954) that an appellate tribunal in an admiralty case is permitted to set aside the judgment below only when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Contrary to the assertion of Petitioner, there is no conflict between the Second and Ninth Circuit Courts of Appeal on this issue. Both Courts have specifically adopted the scope of review rule as set forth in *McAllister*.

In re *Grace Line, Inc.*, 517 F.2d 404, 406, 407 (2nd Cir. 1975); *Tupman Thurlow Co., Inc.* v. *S.S. Cap Castillo*, 490 F. 2d 302, 304 (2nd Cir. 1974); and *United States* v. *Alaska Steamship Co.*, 491 F.2d 1147, 1151 (9th Cir. 1974).

Moreover, Petitioner Glenview has no interest in a broader scope of review since it was appellee.

II.

ADMIRALTY JURISDICTION WAS ADMITTED AND INVOKED BY PETITIONER.

Admiralty jurisdiction was invoked by Petitioner Glenview when it filed its Petition For Limitation Of Or Exoneration From Liability, as owner of a $100 canoe. It was stipulated and agreed by the parties that the

accident occurred on a vessel within the navigable waters of the United States. The action was tried by the District Court on the theory of a maritime tort, and there was no objection. Nor did Glenview raise any issue on appeal pertaining to the applicability of maritime law.

CONCLUSION

Finally, the Petition filed herein fails to state any special and important reasons to support the granting of a review on Writ of Certiorari. The excellent decision of the United States Court of Appeals for the Seventh Circuit correctly states the law. No valid reason is set forth in the Petition which would call for an exercise of this Court's power of supervision.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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